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No. 949

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10) is reported at 286 F. 2d 635. The opinion of the district court (Pet. App. 11-15) is not reported.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1961. On April 17, 1961, Mr. Justice Harlan granted an extension of time to file a petition for a writ of certiorari to and including May 8, 1961,

and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the effective representation of counsel at his trial.

STATEMENT

In 1956, petitioner was convicted on four counts charging the sending of obscene matter through the mails and was sentenced to imprisonment for five years. His conviction was affirmed by the Court of Appeals for the Second Circuit, 237 F. 2d 796, and by this Court, 354 U.S. 476. Thereafter, petitioner applied to the district court for reduction of sentence. The denial of that application was affirmed on appeal. 255 F. 2d 440, certiorari denied, 358 U.S. 819.

Subsequently, petitioner attacked the judgment of conviction, presenting a number of affidavits in which he claimed misconduct or corruption on the part of judge, prosecutor, and defense counsel. The district judge, in his memorandum opinion, stated that he had considered the charges and found "not a shred of evidence" to support any of them. The opinion reviewed petitioner's main points and denied his motion (Pet. App. 11-15). The court of appeals affirmed, holding "that the facts set forth in the moving papers below, as distinguished from assertions of conclusion or suspicion, are insufficient to impeach the original conviction or to warrant a new trial." (Pet. App. 10).

ARGUMENT

In this Court, petitioner emphasizes his claim that he was improperly represented at his trial, alleging that his retained counsel must have colluded with the government in order to have the lawyer's son appointed an Assistant United States Attorney. The matters which petitioner claims show failure of representation are on their face reasonable decisions of trial strategy.[1] As the court below held, petitioner presented no facts "as distinguished from assertions of conclusion or suspicion" which tend to impeach the conviction which was affirmed by this Court in 1957.

[1] The McFall biography of Aubrey Beardsley to which petitioner refers (Pet. 6-7) was used because "Venus and Tannhauser," a story by Beardsley, was included in the book "American Aphrodite", which formed the basis of one count on which petitioner was convicted. A psychologist for the defense testified about Beardsley and the defense offered in evidence two books about Beardsley. The government then offered the book by McFall and used it to cross-examine another psychologist, called by the defense, who testified about Beardsley.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
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BEATRICE ROSENBERG,
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JUNE 1961.

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